

Fair Political Practices Commission
MEMORANDUM

TO: Chairman Randolph, Commissioners Blair, Downey, Karlan and Knox

FROM: C. Scott Tocher, Counsel, Legal Division
Luisa Menchaca, General Counsel

DATE: March 16, 2004

SUBJECT: Post Election Fundraising – Section 85316; Permanent Adoption of Emergency Amendment to Regulation 18531.6 and Permanent Adoption of Emergency Regulation 18531.61

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EXECUTIVE SUMMARY

In January of this year, the Commission took action to reverse prior policy regarding the application of net debt fundraising restrictions by way of amending existing regulation 18531.6 and adopting new regulation 18531.61. Together, these two regulations sunsetted a prior Commission policy which interpreted the net debt fundraising restrictions of section 85316 to apply only to committees created for elections occurring after Proposition 34 went into effect. With the regulatory action taken in January, section 85316 applies to committees established for *any* election, regardless of whether the election took place before or after the effective date of the proposition. An amended or adopted emergency regulation expires automatically by operation of law 120 days after it becomes effective unless the Commission permanently adopts the regulation prior to its expiration. **Therefore, staff proposes that the Commission adopt on a permanent basis, without alteration, the amendment to regulation 18531.6 and regulation 18531.61.**

COMMISSION ACTION IN JANUARY 2004:

Government Code section 85316 provides:

“A contribution for an election may be accepted by a candidate for elective state office after the date of the election only to the extent that the contribution does not exceed net debts outstanding from the election, and the contribution does not otherwise exceed the applicable contribution limit for that election.”

The Commission’s historical interpretation of and application of section 85316 has been thoroughly described and need not be repeated.¹ Suffice it to say that interpretation of section

¹ The most recent digest of the application of section 85316 may be found in the staff memorandum dated December 29, 2003, which was prepared for the Commission’s January 2004 meeting in which the Commission took emergency regulatory action regarding section 85316.

85316 was one of the Commission's first regulatory priorities after the voters adopted Proposition 34 in November of 2000, and it has been the subject of Commission interpretation ever since. By the end of 2001, the Commission concluded that section 85316's limits did not apply to pre-34 committees. That decision was reversed in January of this year when the Commission made a two-step regulatory change:

1. Amended Regulation 18531.6. (Ex. A.)

Prior Commission interpretation was embodied in regulation 18531.6. In order to avoid the risk of retroactive application of the new interpretation, the Commission amended regulation 18531.6 to sunset its application to transactions occurring prior to January 24, 2004, when the new rule would take effect. In this fashion, the regulation remains in effect and thus the law is clear as to transaction occurring prior to January 24, 2004.

2. Regulation 18531.61. (Ex. B.)

With newly adopted (on an emergency basis) regulation 18531.61, section 85316 applies to pre-34 committees and to transactions occurring on and after the effective date of the regulation, January 24, 2004.

There are two distinct segments to the new rule that are encompassed in subdivision (a). One will recall that section 85316 has two forms of limitation: Part 1) a limit *in the aggregate* of accepting contributions *up to* the total amount of net debt outstanding; and Part 2) a *per contribution limit* on individual contributors. The first sentence of subdivision (a) of the proposed regulation states this general rule. The second sentence of the subdivision instructs how to identify the limit referred to in Part 2 of the statute - "the applicable contribution limit for that election." (§ 85316.) The second sentence covers elections where limits are or were in place and establishes the limit as that which was in place at the time of the election. Thus, for a post-34 election, a contribution accepted two years after the election would be limited to the amount the contributor could have given on the date the election was held. This means that the contributor will not be able to take advantage of any intervening increases in the contribution limit for that office which might have taken place as a result of the periodic increases in the limit that reflect inflation. It is important to emphasize that the regulation does *not* apply individual contribution limits to pre-34 committees. This is consistent with section 85321, which states that payments received by committees formed for elections prior to January 1, 2001, are not subject to individual contributor limits (sections 85301 and 85302) when raising funds to retire net debt.²

² Since the emergency action taken in January, Commission staff has had the opportunity to interpret the regulations in the *McPherson* Advice Letter, No. A-04-008, and *Davidian* Advice Letter, No. A-04-061, attached hereto as Exhibit C.

The remainder of the regulation's provisions is the same as the prior regulation, 18531.6.³
RECOMMENDATION:

Staff recommends the Commission make permanent the regulatory action taken in January without change.

Attachments:

- Exhibit A. Amended Regulation 18531.6.
- Exhibit B. Regulation 18531.61.
- Exhibit C. *McPherson* Advice Letter.

³ Subdivision (b) of regulation 18531.6 is not carried over to the proposed emergency regulation in light of the provisions of section 85321, which exempts pre-34 committees from individual contribution limits for net debt fundraising.